

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2091

To be argued by
LOUIS R. ROSENTHAL

B
P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----x

WIDELTO LEYVA,

Petitioner-Appellant

-against-

DOCKET #77-2091

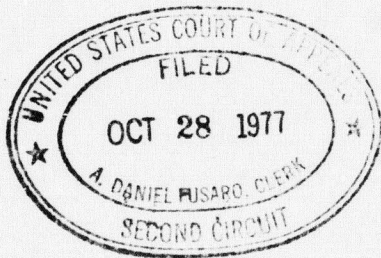
SUPERINTENDENT, GREENHAVEN
CORRECTIONAL FACILITY,

Respondent-Appellee

On Appeal from the United States
District Court for the Eastern
District of New York

-----x

BRIEF FOR PETITIONER-APPELLANT



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WIDELTO LEYVA,

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-against-

SUPERINTENDENT, GREENHAVEN CORRECTIONAL
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Court for the Eastern District of New York

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BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York entered on March 4, 1977, denying petitioner-appellant's petition for a writ of habeas corpus. On July 28, 1977, an order was entered in the United States District Court for the Eastern District of New York granting petitioner-appellant a certificate of probable cause for appeal.

ISSUE PRESENTED

Whether the use of the statutory presumption contained in New York Penal Law Section 220.25 violated petitioner-appellant's constitutional right to due process?

STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

Petitioner-Appellant Widelto Leyva was convicted in Supreme Court, Kings County, of the crime of Criminal Possession of Dangerous Drugs in the First Degree and Fourth Degree after a jury trial on May 3, 1972, (Garbarino, J.) On September 29, 1972, petitioner-appellant was sentenced to 15 years to life imprisonment.

By order of the Appellate Division, Second Department, entered on October 2, 1974, the judgment of conviction was unanimously affirmed.

The Appellate Division order was unanimously affirmed by the Court of Appeals, State of New York in a written opinion entered on December 4, 1975.

Petitioner-Appellant applied to the United States District Court for the Eastern District for a writ of habeas corpus. By order entered on March 4, 1977, said Court denied the petition for a writ.

Petitioner-Appellant appealed said order, and on July 28, 1977 the United States District Court for the Eastern District granted petitioner-appellant a certificate of probable cause to appeal. The order was specifically addressed to the constitutionality of the statutory presumption of knowledge of dangerous drugs found in an automobile. N.Y. Penal L. Section 220.25, which presumption the Court found to be critical to the State's prosecution of petitioner-appellant.

STATEMENT OF FACTS

Petitioner, Widelto Leyva and his co-defendants Carmen Garcia and Jose Lowe were charged with the crimes of criminal possession of a dangerous drug in that they possessed approximately thirty-three ounces of cocaine on September 22, 1971 with the intent to sell the same.

A hearing on a motion to suppress was held prior to the trial by jury.

THE TESTIMONY AT THE SUPPRESSION HEARING

Detective Raymond Viera, of the Narcotic Division of the New York City Police Department, testified that on September 22, 1971, at 1:00 P.M. he was in the Kings County District Attorney's office with Assistant District Attorney Martin Hershey and received a telephone call from a person whose voice he recognized (1-3). The caller told Viera

that Carmen Garcia would be in a gold Chevrolet with Florida license plates on the Brooklyn side of the Williamsburgh Bridge at 4 P.M. that day with a male, 5'10", 160 lbs. with a heavy beard and that they would have a kilo of cocaine with them in a brown manila envelope. (4).

Viera stated that he had known the informant for three years and had been given information by the informant that had resulted in arrests (7). The detective left the D.A.'s office with other detectives and with Assistant District Attorney Martin Hershey and proceeded to the Williamsburgh Bridge (9). At the bridge he observed and stopped a 1969 gold Chevrolet with Florida license plates (10). The appellant Leyva, Carmen Garcia (seated in the middle) and the defendant Lowe, seated on the passenger side were in the car (11-12). Viera saw a manila envelope on the floor of the auto, opened it, decided it was cocaine and arrested the three passengers (10).

Viera was unsure as to the seating arrangement of the defendants in the car other than Carmen Garcia being in the middle (79). At first he stated that Lowe was a passenger and Leyva was the driver (10-12). The defendants ~~did not respond~~ when he asked to whom the envelope belonged and the envelope was not checked for fingerprints. (88)

Martin H. Hershey, Assistant District Attorney

in charge of the Narcotic Bureau stated that on September 22, 1971, at 2:00 P.M. Detective Viera received a telephone call in his office (275-278). Mr. Hershey stated that he spoke with the caller, whose voice he recognized and was told that a 1969 gold Chevrolet with Florida license plates would be on the Brooklyn side of the Williamsburgh Bridge at 4:00 P.M. that day, that Carmen Garcia and one male, 5'10", 165 pounds with a dark face would be in the car and that a package of cocaine in a brown manila envelope would be found in the car (281-284).

Hershey stated that at the scene he saw Viera remove a brown manila package after removing one of the occupants of the car and that the defendant Lowe was the driver of the car (299-307).

After Detective Viera was briefly put back on the stand to identify the packages of cocaine, Patrolman James Mullaly of the Police Laboratory testified that he chemically analyzed the contents of the two envelopes of powder and found cocaine to be present (427-428, 432).

THE TRIAL TESTIMONY

At the trial Detective Viera's testimony generally paralleled his testimony at the suppression hearing. The witness also testified that no fingerprints were found

following analysis of the inside part of the envelope (722).

Patrolman James Mullaly of the Police Laboratory testified, as he had at the hearing, that cocaine was present in the white powder in the plastic envelopes (757-763). On cross-examination the patrolman conceded that he analyzed the remaining portion (765). Detective McLean testified that at 2:00 P.M. on September 22, 1971 he was in the office of Assistant District Attorney Hershey with Detective Viera, Lieutenant Gabriel Stefania and Detective Edward Codelia, left the office with these persons at 3:20 P.M. and proceeded to the Brooklyn side of the Williamsburgh Bridge (797-799). At that location he observed a 1969 gold colored Chevrolet with Florida license plates (801). The witness went on to state that he observed someone in the car whose name he knew (802). Detective McClean then described the arrest of the defendant in a manner similar to Detective Viera (807-815). Defendant Lowe was identified as the driver of the car (812). Detective Codelia asserted that he recognized a person in the car (835).

Lieutenant Gabriel Stefania of the Police Department Narcotics Bureau testified as to his role in the arrest of the defendants. He, too, with Detectives Viera, McClean, and Codelia was at Mr. Hershey's office

on September 22, 1971 and left with them that afternoon to the location noted by his brother officers on South Fifth Street, where the arrest took place (837-839).

Assistant District Attorney Martin H. Hershey testified as he did at the hearing and was in accord with the testimony of the police officers.

The District Attorney stated quite emphatically that the defendants must come forward to rebut the presumption in this case (1141). Even after objection the District Attorney continued to state that the presumption must be rebutted by something that emanates and comes from the defendants (1142).

POINT I

NEW YORK PENAL LAW SECTION
220.25 VIOLATES PETITIONER'S
RIGHT TO DUE PROCESS.

New York Penal Law Section 220.25* provides
"The presence of a dangerous drug in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found".

It has long been recognized that a statutory presumption which operates to shift the burden of proof to the defendant unless he produced rebuttal evidence might be unconstitutional if it fails to satisfy certain due process requirements. Leary v. United States, 395 U.S. 6 (1958); United States v. Romano 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1964); Tot v. United States, 319 U.S. 463 (1942); cf. Note, 2 St. Mary's L.J. 115, 118, (Collecting cases). In a series of early cases the Court required that there be a rational connection between the facts which are proved and the one to be inferred from the presumption. Tot v. United States, supra at 469; United States v. Gainey, supra at 65. Later in elaborating on this in Leary v. United States, supra at 36, the Court stated that a rational connection required

* The section has since been amended so as to restrict its application in certain situations.

a "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend". The issue here then, is whether there is a substantial assurance that the fact presumed, namely that there is knowing possession by each and every person in an automobile where a dangerous drug is found, is more likely than not to flow from the fact proved, the presence of a dangerous drug in that automobile.

The Supreme Court decision in United States v. Romano, supra is very helpful in deciding this issue. There the Court held that presumption of possession of a still from the fact of presence at a still was a violation of due process.

Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt - "the inference of the one from proof of the other is arbitrary.." Tot v. United States, 319, U.S. 463, 467. United States v. Romano, supra at 141.

Similarity in United States ex rel Murphy v. Warden of Clinton Prison, 29 F. Supp. 486 (N.D.N.Y. 1939) it was held, although a Writ of Habeas Corpus was denied on other grounds* that a New York Statute which presumed possession

* The District Court refused to overrule the state appellate court's decision upholding the constitutionality of the statute even though it was clear that the District Court believed the statute was

of a machine gun from proof that the person was present in any room, dwelling, structure or vehicle, (emphasis added) where the machine gun was invalid.

Surely it shocks the conscience and reason to presume an innocent and lawful occupant of some other part of a building to be guilty of possessing a deadly weapon like a machine gun of which he has never seen or heard of and of which he knows nothing of such presumption arising from the mere presence of an innocent person in the structure. United States ex rel Murphy v. Warden of Clinton Prison, supra at 493.

In applying these considerations to the case at bar, it is manifest that New York Penal Law Section 220.25 violates the Fourteenth Amendment. The statute here puts too much reliance on a presence at a place where a dangerous drug has been found. It subjects every innocent party who enters into an automobile to the possibility of proving their innocence if such a drug is found. There are just too many reasons why a person is present in an automobile to say with "substantial assurance" that knowing possession of a drug is "more likely than not to flow" from presence in an automobile where the drug has been found.

The Supreme Court in Barnes v. United States, 412 U.S. 837, 843 (1973) went a step further. The Court stated that the teachings of Leary, Romano, and Tot, were

*unconstitutional. The District Court held if a State's Appellate Court was going to be overruled it was the duty of the Second Circuit to do it. The Second Circuit affirmed the denial of the writ without reaching the issue of the constitutionality of the state (108 F₂ 861, 2nd Cir., 1939). The passage of 28 U.S.C. Section 2254 and the exhaustion of state remedies doctrine have rendered these considerations immaterial.

not particularly clear with regard to the standard applicable for presumptions in criminal cases whether it be the "rational connection", "more likely than not," or "reasonable doubt" tests. However, it did state that if the statutory inference submitted to the jury satisfied the reasonable doubt standard (evidence necessary to involve the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the "more likely than not" standard, then it clearly falls within the bounds of due process.

In the instant case, the only evidence of possession is the mere presence of the defendant in the automobile. Normally the mere presence in an automobile has been held to be insufficient to show possession of an illicit drug. Delgado Arellanes v. United States, 302 F. 2d 603, Cert. den. 371 U.S. 930 (1962). There are too many reasons why an innocent individual would be present in an automobile and not know of the presence of an illegal drug. Clearly, without more evidence, one can see that the element of possession has not been proved beyond a reasonable doubt.

Considering both the "more-likely-than-not" and "reasonable doubt" standards it is clear that the petitioner was denied his Fourteenth Amendment right to due process and a writ of habeas corpus should be granted.

The due process clause of the Fourteenth Amendment

requires that the prosecution prove each element of an offense and fact necessary to constitute the crime charged beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re: Winship, 397 U.S. 358 (1969). The fact that the prosecution seeks to prove one such element through the use of a statutory presumption should not be crucial. Proof of such an element is still a requirement for conviction and due process demands that such a standard of proof be applied.

In the case at hand, the petitioner was convicted of Criminal Possession of a Dangerous Drug in the first and fourth degrees. The element of possession, which the prosecution sought to prove by means of a statutory presumption, is of course, the crucial element of the crime. It therefore would have had to have been proven beyond a reasonable doubt. We contend that the prosecution's case was defective in this sense. The prosecution only proved that the defendant was present in the automobile where the drugs were hidden. There are many reasons why the defendant might have been in that car. It was not the defendant's responsibility to come forward and explain his presence in the automobile. That responsibility and the burden of proving that the petitioner was "in possession" of the drugs lies with the prosecution. The prosecution has clearly failed to prove the element of possession beyond a reasonable doubt.

C O N C L U S I O N

The order denying petitioner-appellant a
writ of habeas corpus should be reversed.

Respectfully submitted,

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COPY OF THE WITHIN PAPER
RECEIVED

OCT 28 1977

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